



POLICE DEPARTMENT

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In the Matter of the Disciplinary Proceedings	:
	:
- against -	:
	:
Sergeant Tracy Gittens	:
	:
Tax Registry No. 930222	:
	:
Fleet Services Division	:
	:
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Sergeant Tracy Gittens, Tax Registry No. 930222, Shield No. 04072, Social Security No. ending in [REDACTED] having been served with written notice, has been tried on written Charges and Specifications numbered 2017-16897, as set forth on form P.D. 468-121, dated January 17, 2017, amended March 20, 2018, and after a review of the entire record, Respondent is found Guilty.

Now therefore, pursuant to the powers vested in me by Section 14-115 of the Administrative Code of the City of New York, I hereby DISMISS Sergeant Tracy Gittens from the Police Service of the City of New York.


JAMES P. O'NEILL
POLICE COMMISSIONER

EFFECTIVE: June 21, 2018



POLICE DEPARTMENT

May 15, 2018

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In the Matter of the Charges and Specifications :

Case No. 2017-16897

- against - :

Sergeant Tracy Gittens :

Tax Registry No. 930222 :

Fleet Services Division :
-----X

At: Police Headquarters
One Police Plaza
New York, NY 10038

Before: Honorable Nancy R. Ryan
Assistant Deputy Commissioner Trials

APPEARANCES:

For the Department: Jamie Moran, Esq. .
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For the Respondent: Michael Giordano, Esq.
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New York, NY 10007

To:

HONORABLE JAMES P. O'NEILL
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NEW YORK 10038

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Charges and Specifications:

1. Sergeant Tracy Gittens, while assigned to the Intelligence Bureau, on or about and between October 8, 2016 and January 6, 2017, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department in that Sergeant Gittens wrongfully ingested Marijuana without police necessity or authority to do so. *(As amended)*
P.G. 203-10 Page 1, Paragraph 5 GENERAL REGULATIONS
2. Sergeant Tracy Gittens, while assigned to the Intelligence Bureau, on or about and between October 8, 2016 and January 6, 2017, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department in that Sergeant Gittens wrongfully possessed Marijuana without police necessity or authority to do so. *(As amended)*
P.G. 203-10 Page 1, Paragraph 5 GENERAL REGULATIONS

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before the Court on March 20, 22, and 23, 2018. A post-trial conference call with counsel and the respective expert witnesses was conducted on March 29, 2018. Respondent, through her counsel, pleaded Not Guilty to the charges. The Department called Police Officer Althea McLean, Doctor Thomas Cairns, Gloria Jean Dimick, and Deputy Chief Surgeon Joseph Ciuffo as witnesses. The Respondent called Doctor Donald Hoffman as a witness and testified on her own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

After reviewing the evidence presented at the hearing, and assessing the credibility of the witnesses, the Court finds Respondent Guilty of the charged misconduct.

FINDINGS AND ANALYSIS

The following facts are undisputed. Respondent was randomly screened for drugs by the Department on January 6, 2017. Police Officer Althea McLean of the Medical Division collected three hair samples from Respondent's head, and sent two to Psychemedics Corporation (Psychemedics), a drug testing laboratory in California. As per Department policy, the third sample was stored at the Medical Division so that, in the event that the first two samples tested positive, Respondent could opt to send the third sample to a second laboratory for independent

testing. A urine sample was also collected. On January 16, 2017, Psychemedics notified the Department that both of Respondent's hair samples tested positive for the marijuana metabolite, Carboxy THC. The results reported were 2 picograms (pg.) per 10 milligrams (mg.) of hair and 3.3 pg./10 mg. (Dep't Ex. 10). Respondent elected to send her third hair sample to Quest Diagnostics (Quest) for testing. The third sample also tested positive for the presence of the marijuana metabolite, reporting a concentration of 2.4 pg./10 mg. The urine sample was negative.

After learning of these results, Respondent also had a hair sample collected by LabCorp on January 18, 2017, and tested by the U.S. Drug Testing Lab, which reported a negative result for cannabinoids. A urine sample was also collected and tested negative. (Resp. Ex. C).

At issue in this case is whether or not the scientific evidence proved, by a preponderance of the evidence, that Respondent wrongfully ingested and possessed marijuana. Respondent asserted that she could have been exposed to the drug passively without her knowledge. She argued that hair testing was incapable of confirming whether ingestion was intentional and that Psychemedics' wash procedures could not guarantee the removal of all contaminants from the hair prior to analysis. She also contended that her use of hair products and gels, vitamins, and other over-the-counter-supplements could have caused the positive result, or that she might have unknowingly consumed food containing marijuana or its derivatives. Finally, she raised a brief argument that the Department had not set forth any evidence of wrongful possession, insisting that a showing of custody and control of the drug was needed.

The Hair Sample Collection

On January 6, 2017, Respondent was notified that she was to undergo a random drug test. Approximately two and a half hours after receiving the notification, Respondent reported to the Medical Division and met with Police Officer McLean. (Tr. 20-21) As of that date, Officer

McLean had been assigned to the Medical Division's drug screening unit for approximately six years and had collected an average of five to eight samples a day. She received a certification in collecting hair samples from Psychemedics after completing an online course. (Tr. 14, 17, 52)

After arriving at the Medical Division, Respondent filled out a Drug Screening (hair) Questionnaire where she indicated that she had not taken any prescription medication in the past three months (Dep't. Ex. 1). She also completed a Questionnaire for the urine test indicating the drinks and foods she had consumed in the last three days and 24 hours respectively, and represented that she had not taken any medication in the last 72 hours. (Dep't. Ex. 2). According to Officer McLean, she had a specific recollection of Respondent because they spoke about a mutual acquaintance. She remembered that Respondent had a ponytail that was not her natural hair. She was familiar with these kind of hair accessories as she sometimes used them herself and had collected from individuals with similar hairstyles and accessories in the past.

To take the samples, Officer McLean wiped down the table with alcohol and then covered it with white paper in Respondent's presence. With gloved hands, she used sterile scissors to cut about four inches of hair, cutting across the back of the head, close to the scalp, two inches above the nape of Respondent's neck. She divided the hair into three samples (A, B & C) each containing at least 50 milligrams of hair. Each sample was placed in tinfoil, inserted into three separate envelopes and packed in separate plastic bags. The envelopes and bags were sealed in front of Respondent, who initialed the envelopes and the security tape on the bags. Custody and control forms and sample acquisition cards, each containing the same bar code, were signed by Respondent, certifying that she consented to testing, that the sealed samples were hers, that her hair was cut close to the skin, and that she had witnessed Officer McLean seal the sample envelopes. (Tr. 18, 31-46, 50-54, 57-60, 314; Dept. Exs. 3, 5-6)

Officer McLean placed the three samples in a temporary storage area within the Drug Screening Unit. The A and B samples were packed together and sent to Psychomedics. Officer McLean was later notified by her supervisor that Respondent's hair sample had tested positive for marijuana. (Tr. 47-57; Dep't Ex. 7)

Psychomedics Results of NYPD Hair Samples

Dr. Thomas Cairns is the senior scientific advisor at Psychomedics and is responsible for reviewing all data packages produced by the laboratory. Psychomedics has been cleared by the Food and Drug Administration (FDA) to test hair samples for drugs, including marijuana, and is licensed by the New York State Department of Health in forensic toxicology to conduct hair testing for drugs. Psychomedics is licensed in multiple other states for the same function and is accredited by the College of American Pathologists. Based on his qualifications, as cited in his curriculum vitae, which include approximately 20 publications in peer-reviewed journals on the topic of hair testing for drugs, Dr. Cairns was deemed an expert in the field of forensic toxicology and workplace hair testing. (Tr. 62-67; Dept. Exs. 8 & 9)

Dr. Cairns explained that when an individual ingests marijuana, it enters the bloodstream and passes multiple times through the liver where the drug is metabolized. The metabolite produced is Carboxy tetrahydrocannabinol (Carboxy THC). Carboxy THC is not found in the marijuana plant material or in the smoke. It can only be produced in the human body where it circulates to the base of every hair follicle in the body and is trapped into the hair structure. As the hair grows at the approximate rate of half an inch per month for head hair, it becomes "a tape recorder" of each and every ingestion of marijuana. Because hair grows about half an inch per month, a 1.5 inch sample would have a look back period of 90 days. Dr. Cairns asserted that this look back period makes hair testing a superior drug testing method, as the maximum look back period for a urine sample is 72 hours. (Tr. 78-79, 82, 92-93)

Dr. Cairns testified that the first test that Psychemedics conducts on a sample is an enzyme immunoassay (EIA) which detects the presence of cannabinoids. Psychemedics receives two samples, an A and B sample, but only the A sample is tested initially. If the EIA is determined to be presumptive positive, another portion of the same "A" sample is aggressively washed to remove external contamination, thereby getting rid of any cannabinoids that might have collected on the outside of the hair. The wash is a one hour and 45 minute progressive wash; the sample is first washed with isopropanol for the initial 15 minutes to remove "cosmetic preparation" followed by three 30 minute slightly acidic buffer washes. The hair is then liquefied again and tested using gas chromatography mass spectrometry (GC/MS/MS) to identify the precise amount of Carboxy THC present in the bloodstream. (Tr. 79-86, 112-15)¹

If GC/MS/MS analysis finds that Carboxy THC is present at or above an administrative cutoff level of 1 pg./10 mg., the B sample is removed from temporary storage and tested for confirmation purposes using GC/MS/MS. Dr. Cairns explained that this administrative cutoff level is established by Psychemedics, cleared by the FDA and has been adopted by the NYPD. The cutoff, he explained, "represents in essence multiple ingestions." He detailed that although a picogram is a small amount, it still contains millions of molecules of Carboxy THC. Only where both the A and B hair samples test positive for Carboxy THC at or above this administrative cutoff does Psychemedics report a positive finding to the Department (Tr. 83-89, 93).

Cairns testified that Psychemedics ensures the quality and integrity of the samples as they move from person to person in the laboratory by maintaining the chain of custody for each

¹ Dr. Cairns confirmed that he was aware of a 2013 appeal before the Massachusetts Civil Service Commission involving ten Boston Police Department officers who were terminated after testing positive for cocaine following Psychemedics hair analysis. Following the appeal hearing, four officers remained terminated, but six were reinstated. Cairns suggested that the Civil Service Commission considered factors beyond the scientific methodology of the tests, in particular the officer's testimonies and work histories. (Tr. 108, 123-24)

sample. Each person who touches or performs part of the analytical procedure indicates what they did to the sample and by whom each step was performed (Tr. 71-76, 84-85, Dep't Ex. 11).

At trial, Dr. Cairns reviewed the laboratory data package that he prepared on January 24, 2017, which contained all chain of custody documents for Respondent's samples, the final test reports and his executive summary. (Dep't. Ex. 10). He detailed that after GC/MS/MS analysis, both Respondent's A and B samples tested positive for marijuana at levels above the administrative cutoff. Respondent's "A" sample indicated the presence of Carboxy THC at a level of 2.0 pg./10mg. Respondent's "B" sample confirmed the presence of Carboxy THC at a level of 3.3 pg./10mg. Dr. Cairns characterized the difference between the two samples as "essentially identical" within a variance and indicative of Respondent's ingestion of marijuana on multiple occasions during the 90 days prior to hair collection, emphasizing that her concentration levels were in excess of the cutoff representing multiple ingestions. He explained, "[t]he more marijuana you smoke, the more metabolite will be trapped in the hair. So . . . the higher the level above the cutoff indicates higher consumption." (Tr. 87-94)

The Quest Results of Respondent's Third NYPD Hair Sample

Dr. Cairns also reviewed and interpreted the laboratory data package prepared by Quest Diagnostics, which tested Respondent's "C" sample. He noted that the Department requires that the "C" sample be tested by a lab with FDA clearance and that the test be conducted at a limit of detection without regard to a cutoff. Though no document was entered into evidence, Dr. Cairns testified that Quest reported that the "C" sample tested positive for Carboxy THC at a concentration level of 2.4 pg./10 mg. This result, he stated, was right in the middle of the two Psychemedics tests, characterizing it as a "bona fide result." (Tr. 94-98)

Post- Results Interview and Subsequent Testing

Deputy Chief Surgeon, Dr. Joseph Ciuffo, testified for the Department. He explained that in addition to seeing MOS who are on sick report and operating a private practice, he also holds the role of Medical Review Officer for the Department, a role first created by the federal government in connection with military drug tests. A Medical Review Officer is a licensed physician, certified in the area of workplace drug testing, who acts as an independent reviewer of test results to explore legitimate alternative medical explanations for positive drug tests. Dr. Ciuffo reviews all positive drug tests for the Department. (Tr. 178-87, 194; Dep't Ex. 17)

Dr. Ciuffo received Respondent's test results January 16, 2017. After an initial review, he spoke with Respondent by phone that day. During the interview, Dr. Ciuffo asked Respondent if she had experienced any problems during the collection process; she indicated there had been no issues. He then asked what medications she was taking and Respondent detailed that she was only taking over the counter vitamins. He did not recall which vitamins Respondent listed and did not specifically ask about herbs, other supplements or special diets. He did, however, ask if there was anything Respondent thought could have caused her to test positive for marijuana, but she offered no potential reason or additional information. After reviewing his notes from this conversation along with all documents pertaining to her test, Dr. Ciuffo made a final determination that there was no alternative explanation for Respondent's positive test. (Tr. 194-204, 214-18, 223-26; Dep't Ex. 18)

Respondent recounted that when Dr. Ciuffo asked for an explanation, she had none, as she "was shocked...Because I do not do drugs." She listed a variety of over the counter vitamin

supplements that she was taking including milk thistle², vitamin B complex, garlic, Echinacea, and goldenseal, which Ciuffo told her would not have affected the test. (Tr. 315-19, 335, 338)

Respondent testified that during this conversation, she volunteered to immediately submit another hair sample for testing, emphasizing that it was "impossible" for her test to be positive, but Dr. Ciuffo told her that was not Department policy. The next morning, she contacted her personal doctor to arrange for bloodwork, urinalysis and hair analysis "because the test had to be wrong...." Her doctor sent her to LabCorp for the hair analysis. A hair sample was collected on January 18, 2017 and analyzed by the United States Drug Testing Laboratory (USDTL), using an ELISA immunoassay test to screen for cannabinoids. Both the hair and urine tests came back negative. (Tr. 316, 320-25, 334, 338; Res. Exs. B & C)

Respondent also requested and paid for DNA testing of the hair sample to verify that the sample tested by Psychemedics was, in fact, her hair. She explained, "I do not do drugs so something had to be off. I wanted to make sure it was my hair." (Tr. 325) Dr. Cairns retrieved the hair sample from storage and sent several hairs wrapped in tinfoil and a sample acquisition card in a sealed bag along with chain of custody documentation to Mitotyping Technologies on April 27, 2017. (Tr. 100-01, Dep't Ex. 12) On May 5, 2017, Dr. Ciuffo, with gloved hands, took a buccal swab from Respondent using what he described as a toothbrush motion to get Respondent's cells onto a cotton-tipped applicator. A protective cap was then attached to the applicator. Dr. Ciuffo initialed the outer covering and placed the applicator into a pouch with a tamper proof seal. The pouch was placed in an outer plastic bag with another seal and labeled

² Respondent explained that she is [REDACTED] and has a [REDACTED]. She acknowledged that her [REDACTED] is functioning and "still works," noting that she takes milk thistle, a natural supplement that she believed aids [REDACTED] function. (Tr. 318-19, 335, 338-39) Dr. Cairns testified that a "sufficiently damaged" [REDACTED] might cause an individual to produce less of the Carboxy THC metabolite, but asserted that Respondent's test results indicated her metabolism was "perfectly normal." (Tr. 134-35)

with Respondent's name and Ciuffo's initials. These steps were all taken in Respondent's presence before shipment to Mitotyping. (See Dep't Exs. 15 & 16; Tr. 205-211)

Gloria Dimick, a forensic DNA analyst at Mitotyping Technologies, testified for the Department as an expert in mitochondrial DNA analysis. (Tr. 145-50, Dep't Ex. 13) She explained that mitochondrial DNA is only inherited from one's mother and is essential for testing samples that have minimal amounts of DNA or have been exposed to environmental conditions that cause degradation of DNA. (Tr. 153-54) Mitochondrial DNA testing was done on the hair sample and buccal swab in connection with this case using testing procedures that are generally accepted as valid and reliable by the scientific community in accordance with guidelines. Ms. Dimick testified that analysis revealed that the hair sample and the buccal swab shared a common base at every compared position. As such, Respondent and her maternal relatives thus could not be excluded as the contributor for the hair sample. Dimick explained that the frequency of this DNA profile is estimated at 0.15 percent, thereby excluding 99.85% of the North American population. (Dep't Ex. 14; Tr. 153-56, 164-76)

Respondent's Defenses

Respondent posited several defenses to the instant charges, insisting that she had never ingested a drug in her life. First, Respondent argued that that hair testing was unreliable because it cannot, with certainty, determine whether an individual intentionally ingested a drug or whether contamination of the hair was the result of inadvertent exposure. She emphasized the fact that Psychemedics did not analyze the washes to determine whether external contaminant was present at some point. It was suggested that hair gels or oils may have been a potential contaminant. Respondent further pointed to the negative USDTL hair test of a sample taken twelve days after the Department drug test as evidence of the unreliability of the Psychemedics and Quest test results. Respondent also argued that she may have unknowingly consumed over-

the-counter vitamins, supplements, or foods containing small amounts of marijuana, thereby causing a false positive. Finally, Respondent contended the Department had not proved the possession specification because there was no evidence that anyone had seen Respondent in possession of marijuana and no marijuana was recovered from her at any point.

Passive Exposure and/or External Contamination of Hair

Respondent did not present a specific theory about how she believed her hair came to be contaminated with marijuana; rather she argued more generally that Psychemedics' testing procedures could not confirm intentional ingestion "with certainty," and pointed to her use of a "variety" of hair products and gels as a potential contaminant. Counsel also asserted in a post-trial submission that marijuana could be integrated into a non-user's hair "through contact with the sweat or oil secretions of a marijuana user."

Dr. Cairns testified that Psychemedics ensured removal of contaminants by using an aggressive wash procedure that removes any drug on the outside of the hair structure, including in a person's sweat, but not trapped via ingestion through the bloodstream. Prior to GC/MS/MS analysis, Respondent's hair samples were washed for one hour and forty five minutes, followed by a 15 minute isopropanol wash to remove any "cosmetic preparation," followed by three 30 minute slightly acidic buffer washes. The final wash was not analyzed to determine its contents, as that is not Psychemedics practice when testing a sample for marijuana, although it is done for the other drug groups. Cairns explained this is because Carboxy THC, the marijuana metabolite, is "highly water soluble," and that Psychemedics had established, via kinetic research and substantial experience with thousands of samples, any Carboxy THC in an individual's sweat would be removed completely in the first or second wash. (Tr. 112-16, 128-29)

When asked on a post-trial conference call to elaborate on this issue, Cairns explained that there cannot be external contamination by Carboxy THC because it does not exist outside

the human body. Carboxy THC, he explained, is not found in the marijuana plant or in smoke and is a unique marker of "pure ingestion." It therefore could not be deposited onto Respondent's hair via ambient exposure. He acknowledged that Carboxy THC would be present externally in the sweat of a marijuana user but detailed that the wash "is performed mainly to remove any potential contamination [of sweat] . . . placed there by the donor of the hair sample themselves." (Tr. 373-74) With respect to hair products and gels containing hemp or other cannabinoids, Cairns stated that they would not contain Carboxy THC, reiterating that it is only found inside the human body, and that any cannabinoids in a hair product would be washed off prior to GC/MS/MS analysis. (Tr. 377)

Respondent presented the testimony of Dr. Donald Hoffman, a board certified forensic toxicologist who had spent 27 years with the New York City Office of the Chief Medical Examiner, as an expert in forensic toxicology. Dr. Hoffman is currently an adjunct professor in the Forensic Science Department at John Jay College of Criminal Justice, in addition to serving as laboratory director for multiple Connecticut laboratories. He has co-authored about two dozen articles in the general area of forensic toxicology, include one dealing with hair testing in 2009. Dr. Hoffman acknowledged that his article on hair testing did not deal with marijuana and that he had never worked in a lab conducting workplace hair testing. (Tr. 234-45, Res. Ex. A)

He was, however, familiar with the hair collection and testing procedures described by Dr. Cairns, noting that Psychemedics was a highly reputable, FDA cleared lab. Like Dr. Cairns, he explained that wash procedures are performed for the purpose of trying to remove extraneous drug that may have collected on the hair. Dr. Hoffman testified, though, that one could not say with "one hundred percent certainty" that wash procedures "absolutely removed a hundred percent of contamination" from the hair. He contended that once a drug has incorporated into the hair through sweat or oil secretions, it becomes "indistinguishable at that point from any drug

which would be normally secreted into these fluids as a result of normal body distribution." He detailed that a wash could be analyzed to ascertain whether there was external contamination. If the wash material tested positive for the drug, Dr. Hoffman believed that was an indicator "that there was surface material which presumably came about from external sources." He opined, "If you don't analyze the wash, while it may be reasonable to say that an appropriate wash step has taken place, one doesn't nonetheless know whether or not, the initial wash would have shown positive or not." (Tr. 250-53, 275, 380-83)

Dr. Hoffman did not dispute the accuracy of the levels reported in the Psychomedics test. However, he did not believe that the results were necessarily representative of Respondent's intentional ingestion of marijuana, testifying that, "Given what is known about the possibility of external contamination making its way into the system...you cannot state with reasonable scientific certainty that that had to have come from intentional intake." Though Dr. Hoffman acknowledged that the Carboxy THC metabolite is not found in the marijuana plant nor in smoke, he testified that passive ingestion could not be ruled out in this case because "when you have very small amounts³ of the [marijuana] metabolite present, you cannot rule out the possibility that there was some form of passive intake...or even if it involved a settling of drug which dissolved...into the sweat and oil secretions on the scalp and then became incorporated." He also suggested that inadvertent inhalation of marijuana smoke could cause the drug to metabolize in the same way as it would when someone was voluntarily ingesting or inhaling. (Tr. 262, 273, 294-96, 370-76)

On the issue of hair products, Dr. Hoffman acquiesced that "if anything [external] were applied to the hair containing Carboxy THC, in all probability that would get washed out." He

³ Dr. Hoffman acknowledged on cross that there are "probably" millions of Carboxy THC molecules in one picogram of marijuana. (Tr. 284)

suggested though that during product application, there could be "inadvertent ingestion" or "inadvertent inhalation," which would cause the parent compound of a drug to metabolize in the body and appear in the hair. (Tr. 371-79)

First, it should be noted that hair testing has been held reliable by New York State courts and by this tribunal in establishing an officer's use of illegal drugs. As such, the onus is on Respondent to present convincing and sufficiently detailed evidence supporting Dr. Hoffman's assertion that hair testing is inadequate to reliably determine that an officer illicitly ingested drugs and her argument that her positive test result was the result of innocent ingestion or exposure. *See Disciplinary Case No. 2016-15832*, (Feb. 16, 2018); *Fire Dep't v. Simpkins*, OATH Index No. 2308/14 (Dec. 11, 2014) ("Respondent bears the burden of proving an affirmative defense of innocent ingestion by a preponderance of the evidence."), citing *Fire Dep't v. Rolling*, OATH Index No. 1615/11 at 4 (Sept. 23, 2011), *adopted*, Comm'r Dec. (Oct. 31, 2011), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 12-26-A (May 22, 2012); *Dep't of Correction v. Gaskin*, OATH Index No. 1459/13 (Sept. 13, 2013), *aff'd*, NYC Civ. Serv. Comm'n Case No. 2013-0243 (Apr. 14, 2014) ("The burden is on respondent to prove innocent or unknowing ingestion of an illegal drug by a preponderance of the evidence."), citing *Green v. Sielaff*, 198 A.D.2d 113 (1st Dep't 1993).

Second, Respondent's theory of inadvertent, passive exposure is, by nature, highly speculative. Although Dr. Hoffman suggested inadvertent inhalation of marijuana smoke could cause Carboxy THC to metabolize in the body and incorporate into the hair and Respondent's counsel raised the idea that Carboxy THC could have been integrated in the hair through close contact with the sweat or oil of a marijuana user (*See Respondent's April 2, 2018 submission at p.3*), there was no testimony Respondent was ever in close contact with marijuana users as a

result of police work or off-duty interactions. In fact, there was no testimony or evidence in the record that Respondent had been exposed to marijuana at all.

The theory that contamination could have been caused by hair products or gels is similarly vague and speculative. The extent of Respondent's testimony regarding hair products was an affirmative answer when counsel asked if she used "hair products, gels, sprays, [or] stuff like that" in the month the test was conducted. She did not give the name of one product, did not know the ingredients in the products she used and did not speak about the manner or frequency of their application, other than to say she used these non-specific products "all the time."

Ultimately, these speculative arguments about contamination shed no light on why, in Respondent's specific circumstances, three tests by two unaffiliated laboratories reported Carboxy THC in Respondent's hair at levels more than double the Department's administrative cutoff of 1.0 pg./10 mg., which has long been established in this tribunal as representative of multiple ingestions of marijuana rather than passive or inadvertent exposure. See *Case No. 2014-12194* (Oct. 9, 2015) (crediting Dr. Cairns' expert testimony about the "conservative nature of the Department's 1pg/10mg cutoff level," and "convinci[ng] expl[anation] [regarding] how test results above that cutoff point reveal active use of marijuana as opposed to one-time, passive exposure."); *Case No. 2014-12161* (July 30, 2015) ("the administrative cutoff is set high enough to ensure that a positive test result is recorded only for those that have ingested marijuana multiple times during the look back period. It follows that Respondent's 1.3pg and 1.4pg test results, while only 0.3pg and 0.4pg above the cutoff respectively, rule out passive, accidental or casual exposure.").

Still, the tribunal gave careful consideration to the opinions of both experts and the scientific evidence they offered in support of those opinions. Preliminarily, with respect to Dr. Hoffman's assertion that it is not possible to tell with "one hundred percent certainty" that

Psychemedics wash procedures removed all potential external contaminant from the hair or to conclude with "reasonable scientific certainty" that the results indicated that there was intentional marijuana ingestion, it must be noted that this tribunal does not require such certainty. The question to be resolved here is whether a preponderance of the credible evidence in the record indicated that Respondent ingested marijuana.

When Dr. Hoffman was asked about studies that support his opinion that once a drug has incorporated into the hair through sweat or oil secretions, it becomes "indistinguishable" from intentionally ingested marijuana and cannot be removed by wash procedures, he stated generally that he would cite "references that are specifically stated in...the different toxicology reference books that deal with the topic of...absorption." (Tr. 372-73) Regarding the idea of contamination via contact with a marijuana user, Respondent's counsel offered a post-trial submission-- a 2015 publication titled, *Finding Cannabinoids in hair does not prove cannabis consumption*.⁴ In the study, researchers determined that the presence of Carboxy-THC in the hair of a child under age 2, was "possibl[y]" the result of person-to-person transfer, via sweat, as a result of the non-user child's "close contact" with a cannabis user.

Dr. Cairns, during the expert conference call, pointed to a 2016 publication, *Carboxy-THC in Washed Hair: Still the Reliable Indicator of Marijuana Consumption*⁵, which was essentially a response to the study cited by Respondent. The authors of this article performed a variety of experiments and ultimately concluded that Carboxy THC is a highly reliable indicator of marijuana ingestion when paired with an aggressive washing procedure. Carboxy THC negative hair samples were analyzed after (i) extreme exposure to high amounts of marijuana smoke in a confined space; (ii) being commingled overnight with moist hair that contained

⁴ Mossman, B., et al., Sci. Rep. 5, 14906 (2015).

⁵ Hill, V., et al., J. Analytical Toxicology 40:345-349 (2016). (Dep't Ex. 20).

Carboxy THC to simulate person-to-person contact; (iii) contact with fabric potentially contaminated by unwashed Carboxy THC positive hair; and (iv) soaking in a Carboxy THC solution. After exposure, the previously negative samples were analyzed by GC/MS/MS before and after washing.

- Of the seventeen samples exposed to marijuana smoke, just five showed amounts of Carboxy THC on the hair at levels ranging from 0.27 pg./10 mg. of hair to 1.13 pg./10 mg. hair. After the one hour and 45 minute wash procedure, the same procedure used to wash Respondent's samples, the contaminated samples again underwent GC/MS/MS analysis and were all negative (no detection) for Carboxy THC.
- Of the eight negative samples commingled with Carboxy THC positive hair, none of the negative samples were contaminated before or after the washing procedure.
- Of the eight negative samples commingled with fabric that was potentially contaminated after contact with Carboxy THC positive hair, two samples detected 0.63 and 0.75 pg./10 mg. of Carboxy THC prior to washing and no Carboxy THC present after the wash procedure.
- Two samples were soaked in 10 pg./mL PBS and 100 pg./mL PBS of Carboxy THC respectively. Carboxy THC was detected before washing only in the sample soaked in the 100 pg./mL solution at 4.7 pg./10 mg. hair. After the one hour and 45 minute wash, testing indicated no Carboxy THC remained present in that sample.

This study noted that in the experiment discussed in Respondent's cited publication, an extended aqueous wash to remove external Carboxy THC was not conducted, rather that wash procedure consisted of three four minute rinses in water, acetone and petroleum ether. The authors also emphasized that Carboxy THC present externally in the sweat of marijuana user "does not constitute a false positive" and does not debunk the theory that its presence indicates ingestion. In sum, the researchers concluded that their multifaceted experiments established that transfer of Carboxy THC via moisture (in sweat or hair secretions) from Carboxy positive hair to either negative hair or fabric does not occur easily and that, should such transfer occur, an extended wash procedure readily and completely removes it. Thereby, the presence of Carboxy THC in washed hair samples is indicative of ingestion.

Having considered and analyzed the full record put before the tribunal, I find that Dr. Hoffman failed to support his opinions regarding the potential for marijuana to be inadvertently

incorporated into the hair and the efficacy of an extended aqueous wash procedure with the same level of scientific corroboration as Cairns did. On the other hand, Dr. Cairns, who by comparison of the experts' respective CVs, is vastly more experienced with workplace hair testing for marijuana, was able to provide more specific, thorough answers to the questions raised by this tribunal about the potential for contamination both by hair products and via sweat and hair secretions. He detailed how Carboxy THC is not present outside the human body, and how given the water solubility of Carboxy THC and the extensive kinetic research Psychemedics has done with hair samples, any cannabinoid contaminant from hair products or Carboxy THC present in sweat would be removed in the first or second of the four washes conducted on the sample. As such, he convincingly explained that no testing of the final wash is needed when testing for marijuana.

Ultimately, Dr. Cairns' explanation of his confidence in Psychemedics' ability to distinguish between ingestion and contamination from inadvertent exposure was more convincing and supported by the scientific evidence in the record. Conversely, Dr. Hoffman's assertion that the positive results might be the result of passive exposure, or at the very least, that it could not be ruled out with certainty, was not as persuasive or well-supported. The article cited by Dr. Cairns and discussed above, though authored by Psychemedics scientists, was accepted for publication in the peer-reviewed Journal of Analytical Toxicology, where the researchers persuasively explained after conducting a range of exacting experiments that the inadvertent incorporation of marijuana into the hair through smoke exposure or sweat was unlikely and that, if it occurred, any Carboxy THC would have been removed entirely by the Psychemedics wash procedure.

In sum, the Court rejects Respondent's speculative contentions about the positive results being caused by inadvertent exposure and the legitimacy of Psychemedics' hair testing process,

including the wash procedure and its ability to remove contaminants. *See Case No. 2016-15832*, (Feb.16, 2018), citing, *Case No. 2013-9490*, p. 18 (June 16, 2015) (other jurisdictions' doubting Psychemedics results in light of possible environmental contamination were not dispositive before this tribunal; testimony addressed all concerns about science of hair testing, and officer was unable to prove environmental contamination caused positive test results), confirmed sub nom., *Matter of Lumezi v. Bratton*, 147 A.D.3d 566 (1st Dept. 2017) (determination that officer ingested cocaine was supported by substantial evidence, including that hair was subjected to repeated testing by independent laboratories and yielded positive results).

Negative USDTL Test

Respondent pointed to the negative test of a hair sample, collected by LabCorp twelve days after the Department test and tested by the U.S. Drug Testing Lab, as another reason to question the accuracy of the Psychemedics and Quest tests. (Resp. Ex. C) Dr. Hoffman confirmed that this sample was tested using an ELISA immunoassay screen subject to a cutoff. He stated that he had no reason to doubt the results of this test, even when it was pointed out that USDTL lacks FDA clearance. Dr. Hoffman explained that many laboratories that perform hair testing, but do not conduct testing for the federal government, have never applied for FDA clearance. The Department asserted that the lab also lacks a NY State license for hair testing, though Dr. Hoffman noted their lab director is licensed in New York. (Tr. 265-72, 290-91, 303-04)

Dr. Cairns also reviewed the USDTL data package and noted that it lacked information about where the hair was cut from and the length of the sample. As such, he had no parameters by which to compare it to the samples tested by Psychemedics and Quest. (Tr. 102-04)

Though the issues of clearance and licensure are not insignificant as the Department utilized both FDA and NY State licensed laboratories for both the original testing and the "C"

sample testing, that issue ultimately does not factor in the tribunal's analysis because the USDTL data package is so lacking in key facts which would allow for comparison of the results. I agree with Dr. Cairns that without information about the source and length of the hair, there are no parameters that allow for an adequate comparison of the USDTL test with the positive Psychemedics and Quest tests. In a prior case dealing with a similar set of positive test results followed by a negative hair test, this tribunal noted that hair from different areas of the body grows at different rates, and thus represent different look back periods. The length of a sample also affects the look back period. As such, differences in length and source can potentially explain disparate results even where there was an expectation of consistency because the tests were conducted relatively close to one another in time. *See Case No. 2013-9490* (June 16, 2015), confirmed sub nom., *Matter of Lumezi v. Bratton*, 147 A.D.3d 566 (1st Dep't. 2017) (finding that a negative test resulting from a sample collected at Respondent's request 21 days after the Department test lacked probative value as it could not be compared with Department test results because the hair was cut from a different area of the body, the length of hair tested was unspecified and the negative test was subject to a cutoff).

Here, though Respondent stated that the USDTL collector used essentially the same collection procedure as the Medical Division and cut hair from her head,⁶ there is no report or other corroboration supporting that statement and no information whatsoever containing the length of the sample. Additionally, Officer McLean, the Medical Division collector, testified to the fact that Respondent wore a synthetic hair piece that was not her natural hair and Respondent expressed concern that the Psychemedics sample had not been her natural hair, going as far as to request a DNA test of that sample, ultimately confirming it as matching Respondent's DNA

⁶ Respondent testified that the LabCorp collector cut hair from the top of her head, not the back near the nape of the neck, as Officer McLean testified she had done. (Tr. 324)

profile. There was no similar analysis of the USDTL sample, thus leaving an open question of whether the hair that was tested by USDTL belonged to Respondent.

The Department also pointed out that the USDTL test was an immunoassay screen for cannabinoids, subject to a cutoff, whereas the Psychemedics and Quest samples underwent GC/MS/MS analysis to detect the exact amount of the Carboxy THC metabolite in the hair sample. In cases where there is a positive report from Psychemedics and the C sample is tested, the Department requires that the C sample be analyzed using GC/MS/MS analysis at a limit of detection of the substance without regard to a cutoff. Thus, the negative result for the USDTL sample, which was subject to a cutoff, did not necessarily mean marijuana was not present in the hair; it just meant that it was not present at the level of USDTL's concentration cutoff and was therefore reported as a negative test.

With multiple open questions related to the USDTL test, it cannot be directly compared to the positive Psychemedics and Quest results and thus lacks probative value. *See infra Case No. 2013-9490*. As such, this result does not cause the tribunal to call into question the reliability or accuracy of the Psychemedics and Quest results.

False Positive: Inadvertent /Passive Ingestion

Respondent also made the argument that the Psychemedics and Quest tests were false positives resulting from "passive ingestion" of foods, vitamins or supplements containing marijuana or cannabinoids. Much like her argument about hair gels and products, she provided few specifics about what she consumed that might have caused Carboxy THC to be present in her hair. Respondent testified that she took several vitamins and supplements, including milk thistle, vitamin B complex, garlic, Echinacea, and goldenseal, which she typically purchased from Walmart. There was no testimony or evidence indicating that any of these supplements

were known to contain marijuana. Respondent offered no testimony about her diet generally or about possible consumption of food containing marijuana.

Respondent's expert, Dr. Hoffman, contended generally that consuming food, vitamins or supplements, derived from or containing hemp or marijuana could affect the results of a drug test. He explained that even if the product manufacturer attempted to remove most of the active component, residual amounts could still show on a drug test and one could "easily obtain a low level positive," depending on how much of the food or supplement the person consumed and how much of the active marijuana component was contained therein.⁷ On cross, he suggested that it was "possible" to obtain the level of Carboxy THC indicated on Respondent's test by consuming a cake or batch of brownies that had been spiked with marijuana or hashish even just once. (Tr. 263-64, 285-89, 379-80)

Dr. Cairns vehemently challenged the idea that the positive result could have been caused by foods or vitamins, noting that he was not aware of any scientific evidence or peer reviewed literature supporting Dr. Hoffman's position. He noted that foods, vitamins and over-the counter medications are all monitored by either the FDA or USDA. He explained the USDA had "taken action against hemp products" and that neither organization had flagged any specific product as containing sufficient amounts of marijuana to be cause for concern. He acknowledged that some products may contain "very, very, very low levels" of marijuana, suggesting that the level of concentration would be in the range of one hundred times less than the Department's administrative cutoff of 1.0 pg./10 mg. (Tr. 380-81)

Respondent's argument fails on both factual and scientific grounds. First, she did not present any facts to support the theory that the positive test results could have been reflective of

⁷ Dr. Hoffman agreed on cross-examination that hemp products are monitored and regulated by the FDA and the DEA. (Tr. 293)

her unknowing ingestion of marijuana. She pointed to no specific product or food as the possible contaminant, instead raising a vague and general argument that unbeknownst to her, marijuana may have been present in food or vitamins she consumed. Moreover, her expert witness, Dr. Hoffman, speculated that if Respondent had consumed something containing hemp, hashish or marijuana, it would be possible for her to obtain a low level positive above the Department's cutoff of 1.0 pg./10 mg. He cited no studies bolstering this point or lending credence to his opinion that one ingestion of "spiked" brownies could cause test results at the levels found in Respondent's system depending on the potency of the marijuana. He offered no specific opinions or testimony about the vitamins and supplements Respondent testified to taking, leaving this tribunal with the impression that they are not known to contain marijuana. *Compare* with *Case No. 2014-12161* (July 30, 2015) (crediting Respondent's testimony that he unknowingly consumed approximately 15 grams of hemp seeds in smoothies he drank multiple times a week for six months, but ultimately finding that the scientific evidence did not support a finding that said quantities of hemp seeds would have caused Respondent to test above the administrative cutoff at a level of 1.3pg./10mg.). Having considered the testimony and arguments surrounding this false positive/inadvertent ingestion argument, the tribunal finds that it is highly speculative and without persuasive support in the record.

Character and Work History

Respondent testified that she became a police officer after the events of September 11 because she wanted to help the community. She has never been formally disciplined during her tenure and has received just one command discipline for a lost parking plaque. She maintained that she has never ingested or possessed marijuana in her life. (Tr. 310, 326-28)

The tribunal notes that there is no allegation that Respondent acted as if she were under the influence of marijuana while on duty nor any allegation that she was a daily or longtime user.

This tribunal has noted in prior cases dealing with failed drug tests that it is impossible for anyone to know what a colleague does behind closed doors after work. This is the very reason the Department administers random drug tests. Without compelling proof countering the convincing evidence supporting the reliability of the Psychedics and Quest results indicating Respondent ingested marijuana, those results stand.

For all of the reasons set forth above, the tribunal finds Respondent Guilty of wrongful ingestion of marijuana.

Specification 2: Wrongful Possession

Respondent's counsel briefly argued in summation that the second specification charging Respondent with wrongful possession of marijuana has not been established, as there was no eyewitness testimony that Respondent was observed with marijuana and no search conducted recovering marijuana from her. (Tr. 343) Such a showing is not necessary to prove this charge; this tribunal has routinely found officers guilty of both ingestion and possession based on credible Department drug test results. *See e.g., Case No. 2014-12194* (Oct. 10, 2015) ("This tribunal finds that the Department adequately proved the integrity of the sample collection process, that the chain of custody was not compromised, and that Respondent's samples were accurately tested using a New York State licensed and FDA cleared laboratory. The evidence further established through Dr. Cairns' credible testimony, that Respondent's hair samples contained Carboxy THC at a concentration above the administrative cutoff level. In the face of such convincing evidence, this tribunal cannot credit Respondent's self-serving claim that he never smoked marijuana. The Department has proven its case by a preponderance of the evidence . . . that [Respondent] wrongfully possessed and ingested marijuana."); *Case No. 2014-12161* (July 30, 2015); *Case No. 2014-11720* (April 2, 2015), citing, *Matter of McBride v. Kelly*, 215 A.D.2d 161 (1st Dept. 1995). Accordingly, I find that the Department has proved by a

preponderance of the credible evidence that Respondent wrongfully possessed marijuana and is therefore Guilty of Specification 2.

PENALTY RECOMMENDATION

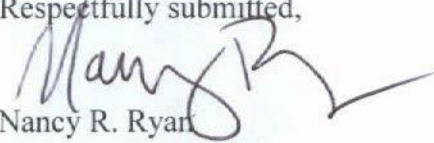
In order to determine an appropriate penalty, Respondent's service record was examined. See Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 240 (1974). Respondent was appointed to the Department on July 1, 2002. Information from her personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

Respondent has been found Guilty of wrongfully ingesting and possessing marijuana. The Department has a strong interest in not employing persons who ingest and possess illegal drugs like marijuana, even where those individuals have long and unblemished service records. See *Case No. 2014-12194* (Oct. 10, 2015) (Ten-year sergeant with no prior disciplinary record dismissed from the Department for possessing and ingesting marijuana. Respondent raised the unpersuasive defenses that his coffee could have been spiked with marijuana or that second-hand smoke in his apartment could have caused the positive result); *Case No. 2014-11611* (Oct. 9, 2015) (Thirty-year detective with no prior disciplinary record dismissed for possessing and ingesting marijuana. Respondent testified that he had no idea how his hair could have tested positive. He alleged external contamination or a collection error but presented no convincing proof or corroboration to support these defenses); *Case No. 2014-12161* (July 30, 2015) (four-year member with no prior disciplinary record dismissed for possessing and ingesting marijuana; tribunal rejected Respondent's claim that regular consumption of smoothies containing hemp seeds caused the positive results); *Case No. 2014-11720* (April 2, 2015) (Twenty-year police officer with no prior disciplinary record dismissed for possessing and ingesting marijuana. After testing positive, Respondent submitted urine, two hair samples, fingernail and toenail samples.

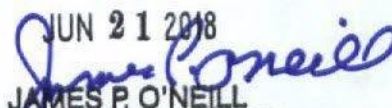
Though these samples came back negative, there was insufficient evidence in the record to find that these follow-up tests negated the original Psychomedics results).

Accordingly, this tribunal recommends that the Respondent be DISMISSED from the New York City Police Department.

Respectfully submitted,


Nancy R. Ryan
Assistant Deputy Commissioner Trials

APPROVED

JUN 21 2018

JAMES P. O'NEILL
POLICE COMMISSIONER



POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
SERGEANT TRACY GITTENS
TAX REGISTRY NO. 930222
DISCIPLINARY CASE NO. 2017-16897

Respondent was appointed to the Department on July 1, 2002. On her last three performance evaluations, she received a 4.0 overall rating of "Highly Competent," a 3.0 rating of "Competent," and a 3.5 rating of "Highly Competent/ Competent." [REDACTED]

Respondent has no prior disciplinary history. In connection with the instant matter, Respondent was suspended from January 16 to February 19, 2017 and then placed on modified assignment. She was also placed on Level II Discipline Monitoring on February 21, 2017. Monitoring remains ongoing.

For your consideration.

Nancy R. Ryan
Assistant Deputy Commissioner Trials